

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

BNSF RAILWAY COMPANY,  
a Delaware corporation,  
  
Plaintiff,

v.

CITY OF WENATCHEE,  
a Washington municipal corporation,  
  
Defendant,

and

ANN RENDAHL, MILT DOUMIT,  
and DAVE DANNER,  
Commissioners of the Washington  
Utilities and Transportation  
Commission,

Intervenors.

NO: 2:22-CV-0263-TOR

ORDER OF DISMISSAL

BEFORE THE COURT are the Intervenor's Motion to Dismiss and the City  
of Wenatchee's Motion to Dismiss. ECF Nos. 10, 12. These matters were

1 submitted for consideration without oral argument. The Court has reviewed the  
2 record and files herein, the completed briefing, and is fully informed. For the  
3 reasons discussed below, the motions to dismiss are granted.

4 **A. Background Information**

5 Plaintiff BNSF Railway Company is an interstate, common carrier railroad  
6 with 32,500 miles of track connecting 28 states and 3 Canadian provinces, and  
7 over 25,000 grade crossings – including over 2,000 in the State of Washington.  
8 ECF No. 1 at 2. Defendant City of Wenatchee plans to install and maintain new  
9 devices where one of its roads crosses Plaintiff’s interstate railway track. The City  
10 is (1) taking federal funds to pay 90% of the cost of the City’s installation work,  
11 and (2) demanding that RCW 81.53.295 requires Plaintiff to forever pay 100% of  
12 the cost of the City’s maintenance work. *Id.* at 2-3. This is a facial challenge to  
13 the operative statute, no individualized facts have been presented to the Court.  
14 BNSF seeks a declaration that the maintenance allocation required by RCW  
15 81.53.295 is either preempted or unconstitutional. Specifically, BNSF seeks a  
16 declaratory judgment that the above *per se* economic charge is unconstitutional for  
17 three separate and independent reasons:

18 (1) it deprives plaintiff of property without due process;

19 (2) it imposes an unconstitutional burden on interstate commerce; and

20 (3) it contradicts federal law governing the use of federal funds for road

1 crossing projects (as well as the federal statute governing economic  
2 charges imposed on interstate railroads).

3 **B. Motion to Dismiss Standard**

4 Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may  
5 move to dismiss the complaint for “failure to state a claim upon which relief can be  
6 granted.” “The burden of demonstrating that no claim has been stated is upon the  
7 movant.” *Glanville v. McDonnell Douglas Corp.*, 845 F.2d 1029 (9th Cir. 1988).

8 A motion to dismiss for failure to state a claim will be denied if the plaintiff  
9 alleges “sufficient factual matter, accepted as true, to ‘state a claim to relief that is  
10 plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell*  
11 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “The burden of demonstrating  
12 that no claim has been stated is upon the movant.” *Glanville v. McDonnell*  
13 *Douglas Corp.*, 845 F.2d 1029 (9th Cir. 1988).

14 While the plaintiff’s “allegations of material fact are taken as true and  
15 construed in the light most favorable to the plaintiff” the plaintiff cannot rely on  
16 “conclusory allegations of law and unwarranted inferences ... to defeat a motion to  
17 dismiss for failure to state a claim.” *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399,  
18 1403 (9th Cir. 1996) (citation and brackets omitted). That is, the plaintiff must  
19 provide “more than labels and conclusions, and a formulaic recitation of the  
20 elements.” *Twombly*, 550 U.S. at 555. When deciding, the Court’s review is

1 limited to the complaint, documents incorporated into the complaint by reference,  
2 and judicial notice. *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d  
3 1049, 1061 (9th Cir. 2008) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551  
4 U.S. 308, 322 (2007)).

5 **C. Due Process**

6 Plaintiff explains that the Due Process Clause “prohibits RCW 81.53.295  
7 from depriving plaintiff of property without due process of law.” ECF No. 13 at  
8 12. Plaintiff contends that a local jurisdiction can force the railroad to “pay 100%  
9 of whatever maintenance work” “the local jurisdiction wishes to incur.” *Id.*  
10 Plaintiff contends that RCW 81.53.295 mandates the railroad “to hand the local  
11 jurisdiction a perpetual blank check to forever pay 100% of whatever maintenance  
12 costs the local jurisdiction wishes to incur”. *Id.* at 13-14.

13 RCW 81.53.295 provides as follows:

14 Whenever federal-aid highway funds are available and are used to  
15 pay a portion of the cost of installing a grade crossing protective  
16 device, and related work, at a railroad crossing of any state  
17 highway, city or town street, or county road at the then prevailing  
18 federal-aid matching rate, the grade crossing protective fund shall  
19 pay ten percent of the remaining cost of such installation and  
20 related work. The state or local authority having jurisdiction of such  
highway, street, or road shall pay the balance of the remaining cost  
of such installation and related work. The railroad whose road is  
crossed by the highway, street, or road shall thereafter pay the  
entire cost of maintaining the device.

1           However, BNSF ignores that the statutes provide that the railroad must  
2 receive notice and an opportunity to be heard before the Commission decides  
3 whether installation of crossing devices is necessary and that hearing provides it  
4 due process. *See* RCW 81.53.261. “The Commission shall also at said hearing  
5 apportion the entire cost of installation and maintenance of such signals or other  
6 warning devices” as provided in RCW 81.53.271. *Id.* Furthermore, the  
7 Commission’s decision is subject to judicial review. RCW 81.53.170.

8           BNSF’s argument that the local jurisdiction can independently force the  
9 railroad to write a blank check is not correct. The railroad receives notice and an  
10 opportunity to be heard by the Commission and the railroad can appeal the  
11 Commission’s decision in the courts.

12           The Supreme Court of the United States has consistently held that  
13 improvements instituted by local transportation needs that further safety and  
14 convenience, “in the exercise of the police power, the cost of such improvements  
15 may be allocated all to the railroads.” *Atchison, T. & S.F. Ry. Co. v. Pub. Util.*  
16 *Comm’n of Cal.*, 346 U.S. 346, 352 (1953). The Supreme Court noted “[h]aving  
17 brought about the problem, the railroads are in no position to complain”. *Id.* at  
18 353.

19           Without any individualized facts to proceed under, BNSF has not shown  
20 “arbitrariness or unreasonableness” in the Commission’s orders. Accordingly,

1 Plaintiff's argument regarding *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405  
2 (1935), which turned on the cost allocation under the "special facts" advanced by  
3 the Tennessee commission are inapplicable to this facial challenge to the statute.

4 Plaintiff's Due Process claim fails.

5 **D. Interstate Commerce Clause**

6 Plaintiff contends that the 100% payment mandate for maintenance costs  
7 required by RCW 81.53.295 violates the interstate commerce clause. Plaintiff  
8 contends this issue cannot be ruled on as a matter of law, but rather must be ruled  
9 on based on the facts of each case.

10 First, there are no facts plead in this case, it is a facial challenge to the  
11 statute. Next, it is worth noting that the Commission's decisions are appealable to  
12 the courts. Finally, the Supreme Court of the United States has stated that "in the  
13 exercise of the police power, the cost of such improvements may be allocated all to  
14 the railroads." *Atchison*, 346 U.S. at 352. The Supreme Court went on to say that  
15 "if the Commission has the right to order these improvements and has not, in  
16 allocating the costs, acted so arbitrarily as to deprive the railroads of their property  
17 without due process of law, the fact that the improvements may interfere with  
18 interstate commerce is incidental. . . . 'To engage in interstate commerce the  
19 railroad must get on to the land and to get on to it must comply with the conditions  
20 imposed by the State for the safety of its citizens.'" *Id.* at 355 (citation omitted).

1 Plaintiff's Interstate Commerce argument fails.

2 **E. Preemption Under Federal Law**

3 Plaintiff contends that the Interstate Commerce Commission Termination  
4 Act of 1995 (ICCTA) preempts RCW 81.53.295 and that the Federal Rail Safety  
5 Act (FRSA) does not apply. Specifically, Plaintiff contends that if any federal-aid  
6 is used to eliminate hazards at railroad crossings, the railroad cannot bear the cost  
7 under 23 C.F.R. § 646.210(a) and (b).

8 According to RCW 81.53.295, the railroad is not charged for the  
9 construction costs if federal-aid highway funds are "available and used to pay" a  
10 portion of installing protective devices. Plaintiff next contends that it cannot be  
11 charged for maintenance. However, according to 23 C.F.R. § 646.210(b)(1)  
12 "Projects for grade crossing improvements are deemed to be of no ascertainable  
13 net benefit to the railroads and there shall be no required railroad share of the  
14 costs." The plain wording of the regulation specifies "crossing improvements" not  
15 maintenance. Therefore, this regulation does not preempt RCW 81.53.295 for  
16 maintenance costs.

17 Other courts have held that FRSA governs the preemption question, not the  
18 ICCTA. *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 107, 108 (2d Cir. 2009);  
19 *Iowa, Chicago, & E. R.R. Corp. v. Washington County*, 384 F.3d 557, 559-60 (8th  
20 Cir. 2004).

1 The other cases cited by Plaintiff are not on point and do not support its  
2 arguments.

3 RCW 81.53.295 is not preempted by any federal statute or regulation.

4 **ACCORDINGLY, IT IS HEREBY ORDERED:**

5 The Intervenor's Motion to Dismiss and the City of Wenatchee's Motion to  
6 Dismiss, ECF Nos. 10, 12, are **GRANTED**.

7 The District Court Executive is hereby directed to enter this Order, enter  
8 Judgment accordingly, provide copies to counsel for all parties, and **CLOSE** the  
9 file.

10 DATED January 24, 2023.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE  
United States District Judge